

memorandum

CC:WR:PNW:SEA:TL-N-7764-96

CLCampbell

Date: MAR 18 1999

To: [REDACTED], Revenue Agent
[REDACTED], [REDACTED]

From: District Counsel
Seattle, M/S W670

Subject: [REDACTED]
Authority after Mergers

You have requested that we advise you who has authority to bind [REDACTED] and its subsidiaries after the reorganization of the [REDACTED]'s for-profit subsidiaries in [REDACTED].

FACTS

In [REDACTED] the [REDACTED] reorganized its wholly owned corporation, [REDACTED], and its subsidiaries. Before the reorganization, the [REDACTED] owned all the shares of stock issues by [REDACTED] ("[REDACTED]"). [REDACTED] wholly owned [REDACTED], and [REDACTED] ("[REDACTED]"). [REDACTED] is an exempt organization which has been in existence since [REDACTED].

The reorganization was accomplished over a two month period which straddled the taxable year of [REDACTED] and the [REDACTED]. The following is a chronological summary of the events:¹

¹ This summary includes all mergers or consolidations relevant to the question of who can act on behalf of the defunct corporations. The summary excludes events relating to the transfer of assets. The [REDACTED] has indicated that the following asset transfers took place during the reorganization; however, we have no independent verification

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██████████ was incorporated in the State of ██████████. The purpose is to hold stock in various companies. ██████████, the trustee of ██████████, is the director and the officers include ██████████ (also a ██████████ trustee) and ██████████, the president of ██████████.

██████████ was incorporated in ██████████. The purpose is to manage commercial properties. The director is ██████████ and the officers include ██████████, ██████████, and ██████████.

██████████ was incorporated in ██████████. The sole director and office is ██████████, formerly an officer of ██████████.

██████████ was incorporated in ██████████. ██████████ is allegedly a non-profit corporation.

of those transfers. On ██████████ ██████████ contributed all assets, other than ██████████ assets, to ██████████, a new entity incorporated in ██████████ on ██████████. According to the ██████████ includes passive investments in ██████████ and ██████████ Limited Partnership. On ██████████ contributed the ██████████ assets, other than ██████████, to ██████████ which was incorporated in ██████████ on ██████████. ██████████ is allegedly a wholly owned subsidiary of ██████████. As a result of the exclusion of ██████████, those passive assets devolved to the surviving corporation, ██████████, following the string of mergers.

The transfer of assets does not affect the analysis of the impact of the merger on authorization to act for the defunct corporations. The asset transfers is relevant to the question of who is liable as transferee for the tax imposed on the defunct corporations. Actually, it appears that the liability for payment of tax will be on ██████████ under the merger statute and on ██████████ and ██████████ under transferee theories. We are not at this time analyzing any issues relating to the transfer of assets. We have not yet received any information to verify the transfer of assets other entities by ██████████ & ██████████.

_____ amended its articles of incorporation. The new stated purpose is to make funds available to _____. The amended articles provided for limited liability and indemnity for the officers and trustees, *inter alia*.

June 30, _____
End of taxable year for the _____ and _____.

_____ files restated articles of incorporation requiring that the board of directors have _____ trustees each of whom must be a trustee of _____. Extensive provisions were made to limit the liability of the officers and directors.

_____ ²
_____ merged into _____. The surviving corporation is _____.

_____ merged into _____ a _____ corporation. The surviving corporation is _____.

_____, a _____ corporation merged into _____, a _____ corporation. The surviving corporation is _____.

_____ merged into _____. The articles of merger provide that _____ is the surviving corporation. The articles further provide that _____, _____, _____, _____ and _____ are directors of the surviving corporation and _____, _____ and _____, *inter alia*, are officers.

The question here is who can now act for the defunct _____ and _____ since _____ was merged into _____ and _____ was then merged into _____, _____ was merged into _____ and _____ was merged into _____. The surviving corporation _____ can act for the predecessor corporations following the mergers.

² All sequential merger agreements effective _____ were entered into on _____.

Since [REDACTED] and [REDACTED] were [REDACTED] corporations and [REDACTED] and [REDACTED] were or are [REDACTED] corporations, there may be a choice of law question. [REDACTED]

[REDACTED]

[REDACTED]

Because [REDACTED] courts look to the Restatement of Laws for guidance on choice of law issues, the Court in [REDACTED] cited Section 188 of the Restatement of Conflicts of Laws (1971) which provides that the local law of the state which has the most significant relationship to the transaction applies in the context of interpreting contracts. While we are not, at this point "interpreting" contracts, the most significant relationship test should apply to the analysis of the question who can sign the consents.³ In [REDACTED], because the most significant transactions took place in [REDACTED], [REDACTED] law applied. We believe that where the merged corporations were [REDACTED] corporations, where the merger articles were signed and the final article of merger were filed in [REDACTED], where the officers and directors of the surviving corporation are in [REDACTED], and where the surviving corporation will operate in [REDACTED], [REDACTED] law will apply.

The obvious significance of [REDACTED] law in the chain of events is that it permits the merger of for profit, stock corporations with nonstock, nonprofit corporations. [REDACTED]

In [REDACTED], pursuant to [REDACTED], a merger becomes effective upon the filing of the articles of merger. When the merger is effective, a single corporation survives and that corporation has all the rights, privileges, immunities and franchises, public as well as private, of each of the merging corporations. [REDACTED]; [REDACTED]. All interest of or belonging to or due to the corporations so merged shall be taken, transferred to and vest in the single surviving corporation. [REDACTED].

Even if [REDACTED] law applies to the intermediate mergers, the result

³ While consents to extend the statute of limitations are not contracts, such consents are like contracts in that the parties must reach a written agreement analogous to a contract. *Woods v. Commissioner*, 92 T.C. 776 (1989).

will be the same. [REDACTED] provides also that the surviving corporation has all the rights, privileges, powers and franchises, public and private and is subject to all the restrictions and duties of the merged corporations.

In both [REDACTED], following the merger, the merged corporations cease to exist as separate entities. [REDACTED]
[REDACTED].

In *Pleasanton Gravel Co. v. Commissioner*, 85 T.C. 839 (1985), the Tax Court held that, under California law, the surviving corporation following a merger executed valid consents extending the statutes of limitations with respect to the taxes of the merged corporation which no longer existed. The court applied the law of the state in which the consents were executed. The court stated that the surviving corporation which became primarily liable for the tax liabilities of the merged corporation after the merger under state law had the power under state law to extend the period of limitation for its own direct liability just as its predecessor.⁴ In this case the result would be the same under the laws of both [REDACTED].

We conclude that the surviving corporation, [REDACTED]
[REDACTED], through its agents (which will now be a function of [REDACTED] law) can execute agreements on behalf of the merged corporations, [REDACTED] and [REDACTED].

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Attorney

⁴ Under both [REDACTED] and [REDACTED] law, the surviving corporation succeeds to the debts and liabilities of the merged corporation.